

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LEWIS E. WILSON**

## Claimant

VS.

# THE BOEING CO. - WICHITA

Respondent

AND

**AETNA CASUALTY & SURETY COMPANY**

## Insurance Carrier

AND

# KANSAS WORKERS COMPENSATION FUND

Docket No. 168,433

## ORDER

Respondent and its insurance carrier appeal from an August 28, 1995 Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral arguments on May 8, 1996 in Wichita, Kansas.

## APPEARANCES

Claimant, having settled his claim with the respondent, appeared not. Respondent and its insurance carrier appeared by and through their attorney, Frederick L. Haag of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Andrew E. Busch of Wichita, Kansas.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

## ISSUES

Claimant alleged bilateral upper extremity injuries. Respondent denied liability for the right upper extremity. Nevertheless, claimant and respondent entered into an agreed compromise settlement of all issues in this case on November 18, 1993. Respondent reserved the issue as to the liability of the Kansas Workers Compensation Fund. The Kansas Workers Compensation Fund [hereinafter Fund] did not stipulate to the reasonableness of the settlement. It reserved for determination the issues of whether claimant suffered personal injury by accident arising out of and in the course of his employment with the respondent on the dates alleged and the nature and extent of any resulting disability. These same issues which were before the Special Administrative Law Judge are now presented to the Appeals Board for review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After a review of the entire record we find claimant to have sustained a work-related injury. The treatment records, medical opinions and complaints of the claimant support a conclusion that the disability should be limited to a scheduled injury to the left arm. Claimant had a prior work-related injury to his left upper extremity. However, the preexisting impairment did not cause or contribute to the claimant's present bilateral disability. In addition, claimant's right upper extremity injury occurred after he left his employment with respondent. The right carpal tunnel syndrome condition was caused by claimant's subsequent activities. Therefore, the Fund is not liable for any portion of the award.

As stated, this case involves the single issue of Fund liability. The Special Administrative Law Judge concluded this issue without making findings of fact and, thus, without applying facts to the applicable law. The Appeals Board considers some further explanation necessary. Therefore, this decision will contain a longer discussion of the record than what might otherwise have been required.

Claimant alleged repetitive-use injury beginning May 1992 and continuing each and every day worked through June 16, 1992. For purposes of this claim the claimant alleged that the repetitive trauma resulted in injury consisting primarily of bilateral carpal tunnel syndrome. It is important to note that claimant had a previous workers compensation claim involving a ganglion cyst on his left wrist. That prior claim was settled June 16, 1992 as a scheduled injury to the left forearm.

Claimant was off work due to the ganglion cyst condition and the resulting two surgeries from approximately December 1991 through May 20, 1992 when he was released to return to work with permanent and temporary restrictions. On May 27, 1992 he was seen at Boeing Central Medical by Dr. Kenneth Zimmerman with complaints of pain and swelling of the left wrist. He was taken off work until June 3, 1992 when he was seen again by Dr. Zimmerman. Symptoms compatible with carpal tunnel syndrome on the left were diagnosed. Claimant was, nevertheless, released to return to work but with a wrist brace. Claimant was terminated from his employment June 16, 1992 as the result of a general layoff. This was the last date he worked for respondent.

Claimant testified that he started working at Boeing in August 1989 as a sheet metal assembler; bucking rivets, drilling, and using vibratory tools. These activities required repetitive gripping as well as forceful pushing and pulling. After his second ganglion cyst surgery in March 1992 he returned to doing the same work on May 20, 1992. Claimant testified that the work violated his restrictions but he was required to do so by his

supervisor. Claimant said his left wrist symptoms thereafter continued and that he subsequently began having symptoms in his right hand and wrist. Claimant attributed these later symptoms to his favoring his right hand in attempting to protect his left hand. He complained to his supervisor and on May 27, 1992 was sent to Boeing Central Medical where he was seen by Dr. Kenneth Zimmerman. According to claimant, he was advised at Boeing Central Medical that since he was being laid off shortly there was no point in treating him and, therefore, he was returned to his regular work. After his June 16, 1992 layoff claimant collected unemployment benefits for approximately two weeks before going to work at Domestic Textile, a laundry business. He eventually quit because he could not do the physical work. At the time of his April 28, 1993 regular hearing testimony, claimant had recently started work as a general laborer for R. J. Reynolds Tobacco getting products together for the sales representatives.

Kenneth D. Zimmerman, M.D., has been a full-time occupational medical physician at Boeing since 1960. He testified concerning his examinations of claimant on May 27, 1992 and June 3, 1992. On both occasions claimant complained of pain and swelling of his left wrist, pain in the fingers of his left hand and weakened grip and pinch strength. Dr. Zimmerman considered those symptoms to be compatible with early carpal tunnel syndrome. Claimant was advised to wear a wrist brace when working and to exercise his hand with rubber grippers. Claimant was scheduled for a recheck on June 23 but was not seen as claimant had been laid off on June 16, 1992. According to Dr. Zimmerman the claimant's preexisting ganglion cyst, as well as the tenosynovitis of the left wrist and thumb which were noted in February of 1992, would predispose claimant to the subsequent development of carpal tunnel syndrome. Dr. Zimmerman stated that claimant never made any mention of right upper extremity complaints and, therefore, he never examined the right extremity.

During the time claimant worked at Boeing in 1991 and 1992 he was also examined by and received authorized treatment from Drs. Eyster and Morris. Their records were, in part, relied upon by Dr. Kenneth Zimmerman. Robert L. Eyster, M.D., a board-certified orthopedic surgeon, also testified. He initially saw claimant for a ganglion cyst on the left wrist in October 1991. An excision of the ganglion cyst was performed on December 20, 1991. Dr. Eyster last saw claimant relative to the cyst on February 3, 1992. During that entire time claimant's only complaints were to the left wrist. He had no complaints relative to the right arm until October 6, 1992 when he returned to Dr. Eyster with complaints of pain in both upper extremities. Likewise, the records of Dr. Morris did not contain any mention of symptoms or complaints relative to claimant's right hand or wrist.

Dr. Kenneth Zimmerman would not relate claimant's right carpal tunnel syndrome to his employment at Boeing since claimant had no right upper extremity complaints during his period of employment. In the opinion of Dr. Zimmerman, claimant's right carpal tunnel syndrome resulted from claimant's activities subsequent to his employment with Boeing. He considered the most likely cause to have been the work claimant performed for the laundry business during August, September and October of 1992. Dr. Zimmerman further opined that the claimant's work at the laundry, after his employment at Boeing, exacerbated his left carpal tunnel syndrome. Dr. Zimmerman admitted that it would be possible for claimant to have developed right upper extremity problems after June 3, 1992 when he was last seen at Boeing Central Medical and prior to his termination of June 16, 1992, but that such would be unlikely.

After leaving Boeing, claimant did not receive medical treatment again until his October 6, 1992 examination with Dr. Eyster. At that time Dr. Eyster felt claimant may have had early carpal tunnel syndrome symptomatology. This diagnosis was later confirmed by nerve conduction studies. He performed carpal tunnel release surgery on November 3, 1992 on the left upper extremity and a right carpal tunnel release was performed on February 1, 1993. Dr. Eyster opined that claimant's carpal tunnel syndrome most likely developed as a result of his work activities at the laundry.

Daniel D. Zimmerman, M.D., first examined claimant on March 30, 1993. He diagnosed medial epicondylitis and ulnar nerve entrapment at the elbow bilaterally and residual carpal tunnel syndrome, post surgery. Dr. Daniel Zimmerman testified that the same type of repetitive activity that can lead to the development of a ganglion cyst can also lead to median nerve entrapment and carpal tunnel syndrome. However, he ruled out any causative relationship between the ganglion cyst and the claimant's carpal tunnel syndrome on the left. In other words, in his diagnostic considerations, there was no relationship between the left wrist ganglion cyst and the left carpal tunnel syndrome. However, in his opinion, more likely than not claimant would not have developed his right upper extremity conditions but for protecting his left arm and overusing it. Because of that overuseage, claimant developed the median and ulnar nerve impingements on the right. However, Dr. Zimmerman could not say when claimant's right upper extremity conditions developed prior to its diagnosis by Dr. Eyster in October 1992. Therefore, he could not relate them solely to claimant's employment with respondent.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments. This is accomplished by relieving employers, wholly or partially, of liability for certain workers compensation accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b)(Ensley) defines a "handicapped employee" as follows:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions: . . . .

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

"17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

The statute requires that the employer knowingly employ or retain the handicapped employee. This is not an issue in this case. The record shows that, after claimant's first injury, respondent filed a Form 88 Notice of Handicap with the Division of Workers Compensation. The Fund's liability depends upon whether claimant's current disability arose out of and in the course of his employment with respondent and would not have occurred *but for* his preexisting impairment. On these issues the evidence is somewhat conflicting.

Claimant was not diagnosed with carpal tunnel syndrome on the right until after he left his employment with the respondent. Although claimant alleges that he made complaints to his supervisor and to Boeing Central Medical relative to his right upper extremity in May and June of 1992, such assertion is contradicted by the medical records and testimony of Dr. Kenneth Zimmerman. The Appeals Board finds that claimant's right upper extremity condition resulted from his activities subsequent to his employment with the respondent. Furthermore, with respect to the allegation that the right upper extremity condition was caused by overuse of the right arm from protecting the left, the Appeals Board finds that because such overuse occurred subsequent to his employment at Boeing and, in particular, during his employment at the laundry, that the employment at the laundry was a subsequent and intervening cause of his right carpal tunnel syndrome. The employment at the laundry likely also aggravated the left carpal tunnel syndrome.

The Appeals Board finds that the preexisting ganglion cyst condition neither caused nor predisposed claimant to develop carpal tunnel syndrome on the left. The opinion testimony of Dr. Daniel Zimmerman is the more persuasive medical evidence on this issue. Respondent did not know about claimant's left carpal tunnel syndrome before the alleged accident. Therefore, respondent relies upon the ganglion cyst condition to satisfy the knowledge requirement of K.S.A. 1991 Supp. 44-567. The absence of a causal connection between the ganglion cyst and the subsequent left carpal tunnel syndrome results in a finding of no liability against the Fund for claimant's left upper extremity disability. As we previously stated, the right upper extremity injury is not work related. Therefore, the Award of the Administrative Law Judge denying liability against the Fund is affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated August 28, 1995 is hereby affirmed, and the orders contained therein are adopted by the Appeals Board as its own.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frederick L. Haag, Wichita, KS  
Andrew E. Busch, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director